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THE NATURE AND SCOPE OF FEDERAL TAX LIENS WITH A SPECIAL CONSIDERATION OF THEIR EFFECT ON MORTGAGE FORECLOSURES

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The broad field of federal taxation is so complex that even those lawyers who make tax law their specialty concentrate on only one subdivision of the entire field. This is made necessary by the constant amendments and additions to the tax laws which, together with the technical regulations promulgated by the Treasury Department, form such a body of statutory laws that complete familiarity with all of its facets is virtually impossible. A great number of our attorneys with general practices recognize these facts and will, more often than not, refer most tax problems to the specialists rather than delve into those forbidding grounds themselves. There is, however, one aspect of federal tax law, namely tax liens, that crops up daily in the most routine matters confronting the practicing attorney, and he should have at least a speaking acquaintance with the subject.

It is here proposed to discuss the general nature of tax liens, to speak briefly of their scope, and to point out the effect which tax liens have on mortgage foreclosures and the procedures by which the title coming through such foreclosures can be cleared of the Government's lien.

ASSESSMENT AND DEMAND

When any of the various taxes imposed by Federal law is due and unpaid, the Internal Revenue Service is authorized to compute the amount due and assess the taxpayer therefor. A lien against the taxpayer in like amount then comes into being by virtue of the formal assessment which is made by the Secretary of the Treasury. The authority

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for this assessment is found in Section 6201,[1] and Section 6203[2] provides that the assessment is made legally binding by recording the computed liability of the taxpayer in the office of the Secretary or his delegate. By virtue of tax regulations[3] the proper delegate is the District Director of Internal Revenue for each collection district.

After the tax has thus been assessed and recorded, the District Director, within sixty days, must give notice thereof and make demand on the taxpayer for payment.[4] The authorities appear clear that such a formal demand is essential to a valid lien, for in *Detroit Bank v. United States*,[5] the Supreme Court, by *dictum*, makes the flat statement:

> "Under R.S. 3186 (now Sec. 6321) there is no lien and no notice can be recorded until there has been a demand by the collector and a refusal to pay it by the taxpayer."[6]

The court in *In Re Baltimore Pearl Hominy Co.*,[7] also by *dictum*, held that demand was a necessary prerequisite to a lien. But, in *Macatee, Inc. v. United States*,[8] the Court held that the demand is for the protection of the *taxpayer*, and that, although it must be made before the United States can enforce its lien, the demand does not necessarily have to be made *after* the time of assessment on the District Director's books to give the tax lien priority over other creditors. In this case the demand for payment was made *before* assessment, and the Court held that the lien arose at the time the District Director received the assessment list without further demand necessary.[9]

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[1] The sections referred to herein, unless otherwise indicated, are contained in the Internal Revenue Code of 1954; Title 26, United States Code Annotated (1955 and Supp., 1956).

[2] *Ibid.*

[3] Fed. Tax Reg. (1956), §301.6201-1.

[4] Sec. 6303.

[5] 317 U. S. 329 (1943).

[6] *Ibid*, 335. Parenthetical material added.

[7] 5 F. 2d 553 (4th Cir., 1925). See also United States v. Ettelson, 159 F. 2d 193 (7th Cir., 1947); In Re Holdsworth, 113 F. Supp. 878 (D. C. N. J., 1953); United States v. Eiland, 223 F. 2d 118 (4th Cir., 1955).

[8] 214 F. 2d 717 (5th Cir., 1954).

[9] It should be noted in regard to Federal estate taxes that there does not have to be assessment and demand before a lien arises. By virtue of Sec. 6324, the lien attaches automatically *at date of decedent's death* upon his gross estate (except the part used for costs of administration and charges against the estate allowed by court) — including property held as *tenants by the entirety*. As held in the Detroit Bank case, *supra*, n. 5, this lien for estate taxes formerly did not have to be recorded to be valid against subsequent purchasers or mortgagees without notice; but in 1942 the Internal Revenue Act was amended [now Sec. 6324(2)] to release the estate tax lien

Scope of Tax Lien

Assuming the formal requisites of assessment and demand, the Federal statute specifically establishes a lien for unpaid taxes in Section 6321 and, says the Supreme Court, "[S]tronger language could hardly have been selected to reveal a purpose to assure the collection of taxes."[10]

Section 6321 provides:

> "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

The law is clear that the effect of this lien, once it is established as set out above, cannot be negated by State laws giving priority to special local liens arising after the tax lien has attached. The Federal law is the supreme law of the land, and in deciding priorities the courts have followed the *"first in time, first in right"* theory regardless of State statutes which might allow certain after-acquired liens (mechanics', state taxes, etc.) to relate back and take priority over tax liens already on the books.[11]

It is basic and elemental in any attempt to comprehend the scope of tax liens to realize fully that, from their inception, they are general and perfected liens on all personal and real property belonging to the taxpayer. The ordinary judgment is general and perfected as to realty, but it is no lien whatsoever on personalty until execution and seizure are accomplished. A junior tax lien, therefore, would take precedence over senior judgments as to all personal assets in the hands of the taxpayer at time of assessment; and if the holder of the judgment sought to execute on the personalty he would find it already encumbered with a perfected lien. The *Greenville* case describes the nature of the lien as follows: "After the lien provided by the statute

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from such parts of the gross estate as are transferred by heirs, legatees, surviving spouse, executors, etc. (to bona fide purchasers) without payment of the estate tax. Under the new law, the tax lien, in addition to property still in the estate, would now attach to all property owned by the *transferor*, and the lien is good for a period of ten years.

[10] Glass City Bank v. United States, 326 U. S. 265, 267 (1945).

[11] United States v. City of Greenville, 118 F. 2d 963 (4th Cir., 1941).

attaches, the [taxpayer's] property has in a sense two owners, the taxpayer and, to the extent of the lien, the United States."[12]

There is no property of the tax-debtor which escapes the all-encompassing reach of the tax lien, and the Fourth Circuit has recently allowed the Government to levy administratively for payment of the tax on such intangible property as a debt due the taxpayer.[13]

In determining the property to which a tax lien attaches and property upon which levy for payment can be made, there is no necessity to be concerned with the various State exemption statutes. It is well settled that the individual States cannot pass laws exempting certain property or assets from creditors, and thereby defeat collection of Federal taxes.[14] The lien attaches, however, only to property owned by the taxpayer, and the courts will look to State law to determine ownership.[15] The tax lien does not, therefore, attach to property held by husband and wife as tenants by the entirety,[16] but after-acquired property does come within the scope of the tax encumbrance.[17]

TIME LIEN ARISES

Although under Section 6303, a demand within sixty days after assessment is essential to make the lien valid, when this is accomplished, the lien itself attaches, not as of the date of demand, but as of the date of original assessment, pursuant to Section 6322:

> "Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time."[18]

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[12] *Ibid*, 965.

[13] See United States v. Eiland, *supra*, n. 7, where a petition filed in bankruptcy after the levy was held not to affect the Government's lien rights. The cash surrender value of an insurance policy is likewise subject to the tax lien; United States v. Behrens, 130 F. Supp. 93 (D. C. E. D. N. Y., 1955).

[14] Cannon v. Nicholas, 90 F. 2d 934 (10th Cir., 1935); Knox v. Great West Life Assur. Co., 212 F. 2d 784 (6th Cir., 1954).

[15] Cannon v. Nicholas, *ibid;* Poe v. Seaborn, 282 U. S. 101 (1930); United States v. Hutcherson, 188 F. 2d 326 (8th Cir., 1951); Jones v. Kemp, 144 F. 2d 478 (10th Cir., 1944).

[16] United States v. Hutcherson, *ibid;* Shaw v. United States, 94 F. Supp. 245 (D. C. W. D. Mich., 1939).

[17] Glass City Bank v. United States, *supra*, n. 10.

[18] See discussion, *infra, circa*, p. 12, concerning limitations as to the meaning of "unenforceable by reason of lapse of time".

It is apparent here that the gap between time of assessment and time of demand might cause difficulty where other creditors' rights accrue during that period. The problem is mostly academic, however, as mortgagees, purchasers, pledgees, and judgment creditors who may acquire their rights during this period are protected by Section 6323 which requires a prior recording of tax liens to give them priority over such competing interests. And as to general creditors who extend credit prior to, during, and after the period in question, the tax lien would always take precedence, since general creditors have no lien whatsoever until they pursue their claims to judgment. Some difficulty might be encountered where a statutory state lien attaches and becomes choate during the period between assessment and demand; and, whether the tax lien would then date back to the time of assessment to give it priority under the "first in time, first in right" theory has not been decided by the courts.[19] *MacKenzie v. United States* recognizes the possible inconsistency between Sections 6321 and 6322, but the particular point was not decided.[20]

Following the reasoning of the *Macatee*[21] case which holds the demand is entirely for the protection of the taxpayer, it would appear that the tax lien should take priority from time of assessment regardless of interests intervening prior to demand. These interests have no more knowledge of the demand than of the assessment, and there would be little force to an argument that they were deprived of a substantial right because the demand was not made before their lien attached.

Recording Requirements and Priorities

Under the law discussed above, it would appear that the tax lien approaches omnipotence, and that lenders or buyers who do not check the District Director's assessment lists act at their peril in dealing with parties whose tax status is unknown. Indeed, such was originally the state of the law, and the unrecorded tax lien was held superior to all interests postdating it even though it enjoyed semi-secrecy by being recorded only on the assessment lists in the various District Directors' offices.[22] The jeopardy to other bona fide interests which resulted from such legislation

[19] MacKenzie v. United States, 109 F. 2d 540 (9th Cir., 1940).
[20] See also United States v. New Britain, 347 U. S. 81 (1954) and Filipowicz v. Rothensies, 43 F. Supp. 619 (D. C. E. D. Pa. 1942).
[21] 214 F. 2d 717 (5th Cir., 1954).
[22] United States v. Snyder, 149 U. S. 210 (1893).

was not allowed to long continue, however, and protection for four high priority classes is now afforded by the public notice required in Section 6323.[23] As a result of this statute,

[23] Sec. 6323 provides:

(a) Invalidity of Lien Without Notice. — Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) Under state or territorial laws. — In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) With clerk of district court. — In the office of the clerk of the United States District Court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; or

(3) With clerk of district court for District of Columbia. — In the office of the clerk of the United States District Court for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(b) Form of notice. — If the notice filed pursuant to subsection (a)(1) is in such form as would be valid if filed with the clerk of the United States District Court pursuant to subsection (a)(2), such notice shall be valid notwithstanding any law of the State or Territory regarding the form or content of a notice of lien.

(c) Exception in case of securities.

(1) Exception. — Even though notice of a lien provided in section 6321 has been filed in the manner prescribed in subsection (a) of this section, the lien shall not be valid with respect to a security, as defined in paragraph (2) of this subsection, as against any mortgagee, pledgee, or purchaser of such security, for an adequate and full consideration in money or money's worth, if at the time of such mortgage, pledge, or purchase such mortgagee, pledgee, or purchaser is without notice or knowledge of the existence of such lien.

(2) Definition of security. — As used in this subsection, the term "security" means any bond, debenture, note, or certificate or other evidence of indebtedness, issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money.

(d) Disclosure of amount of outstanding lien. — If a notice of lien has been filed under subsection (a), the Secretary or his delegate is authorized to provide by rules or regulations the extent to which, and the conditions under which, information as to the amount of the outstanding obligation secured by the lien may be disclosed."

Following the original enactment of this law, the State of Maryland adopted the Uniform Federal Tax Lien Registration Act, Md. Code (1951), Art. 17, Secs. 12-18, to comply with subparagraph (a)(1), and it provides in general:

"12. Notices of liens for taxes payable to the United States of America and Certificates discharging such liens shall be filed in the office of the Clerk of the Circuit Court of the county, and the Clerk of

the Internal Revenue Service records its tax liens in every county wherein it believes the taxpayer may have assets; and such recording operates to give notice of the Government's claim in much the same manner as the civil judgment docket gives public notice of these liens. It has been held that under this statute the individual states may decree only the *place* in which the notice of lien must be recorded, but not the *manner* of execution of notices to be filed by the Government.[24]

There is little trouble with recording procedure under Section 6323 so far as realty is concerned since it has fixed situs, and the tax lien must necessarily be filed in the county where the land lies before it will attach thereto as against the parties mentioned in the statute.[25] Where personalty is involved, however, there may be some question as to where the lien should be recorded. The law says the notice should be filed in the county where the property is located, but it does not specify whether this means where

the Superior Court of Baltimore City, within which the property subject to such lien is situated.

"13. When a notice of such tax lien is filed, the Clerk of the Circuit Court of the county, and the Clerk of the Superior Court of Baltimore City, shall forthwith enter the same in an alphabetical Federal Tax Lien Index, showing on one line the name and residence of the taxpayer named in such notice, the Collector's serial number of such notice, the date and hour of filing, and the amount of tax with the interest, penalties and costs. He shall file and keep all original notices so filed in numerical order in a file or files, and designated Federal Tax Lien Notices.

"14. When a certificate of discharge of any tax lien issued by the Collector of Internal Revenue or other proper officer, is filed in the office of the Clerk of the Circuit Court of the county, and the Clerk of the Superior Court of Baltimore City, where the original notice of lien is filed, said Clerk of the Circuit Court of the county, and the Clerk of the Superior Court of Baltimore City, shall enter the same with date of filing in said Federal Tax Lien Index on the line where notices of the lien so discharged is entered, and permanently attach the original certificate of discharge to the original notice of lien.

"15. Said Federal Tax Lien Index and file or files for said Federal Tax Lien Notices shall be furnished to the Clerk of the Circuit Court of the county, and the Clerk of the Superior Court of Baltimore City, in the manner now provided by law for the furnishing of books in which deeds are recorded.

"16. Sections 12-18 are passed for the purpose of authorizing the filing of notices of liens in accordance with the provisions of Section 3186 of the Revised Statutes of the United States, as amended by the Act of March 4, 1913, 37 Statutes at Large, page 1016, and any Acts or parts of Act amendatory thereof."

[24] Union Planters National Bank v. Godwin, 140 F. Supp. 528 (D. C. E. D. Ark., 1956).

[25] Although there are apparently no reported decisions on the point, it is the opinion of the Internal Revenue Service that purchase money mortgages take priority over tax liens, even where the tax lien is of record prior to the purchase money mortgage. There is danger of clouded title in the event foreclosure takes place, however, and the manner in which to prevent this is discussed later herein, *circa*, pp. 12 *et seq.*

located at the time the tax lien is put on record, where located at the time competing interests acquire their lien, or where located at the time priority is asserted. When we are dealing with movable chattels, the persons mentioned in Section 6323 could acquire their rights in a county within the United States where there may be absolutely no record of the tax lien. To require the Government to record in each of these counties would be an impossible burden not required by the statute; and it seems that the most logical rule follows the general law that the situs of personalty follows the domicile of its owner, and if the tax lien is there recorded it attaches to chattels no matter where they may be located, even if in another state.[26] Where, however, there is personalty which has a distinct situs disconnected from the owner's domicile (such as stock in trade, a seagoing vessel, etc.), it would seem that the notice should be there recorded, regardless of domicile.[27] It will make an interesting case, indeed, when a Californian sells his automobile in Maryland on December second, and the Government then attempts to seize it from the purchaser because of a tax lien filed in the California county of domicile on December first!

Particular notice should also be given to the fact that under the uniform act the tax lien encumbrance is found not in the land, chattel or judgment records, but in a separate Federal Tax Lien Index.

In construing Section 6323, the courts have held its provisions mandatory, and the Government must comply with the recording provisions before another party obtains the status of purchaser, mortgagee, pledgee, or judgment creditor, even though such other party may have actual knowledge of the tax liability.[28] But, once the Government has complied with these provisions, the individual states cannot defeat the collection priority by arbitrary legislation declaring certain lienors to be within the protection of Section 6323. For example, a local statute declaring that a state tax assessment, a mechanic's lien, or the like, has

[26] Grand Prairie State Bank v. United States, 206 F. 2d 217 (5th Cir., 1953); United States v. Spreckels, 50 F. Supp. 789 (D. C. N. D. Cal., 1943); Investment & Securities Co. v. United States, 140 F. 2d 894 (9th Cir., 1944).

[27] Gulf Coast Marine Ways v. The J. C. Hardee, 107 F. Supp. 379 (D. C. S. D. Tex., 1952); United States v. The Pomere, 92 F. Supp. 185 (D. C. D. Hawaii, 1950).

[28] United States v. Beaver Run Coal Co., 99 F. 2d 610 (3rd Cir., 1938). In revising the Internal Revenue Code into the Act of 1954, the House attempted to make the lien binding upon those with notice even though it was not recorded. See 3 U. S. Code Cong. and Adm. News (1954), p. 4554. The Senate deleted this change, however, (p. 5224), the Conference agreed with the Senate, and the final bill did not change prior law.

the force of a judgment is not controlling. The Supreme Court has declared that definition of the terms used in Section 6323 should be uniform throughout the states, and "judgment creditor" in the statute is held to be intended in the usual, conventional sense of a judgment of a court of record, regardless of state legislation.[29] This does not mean, however, that State liens are outlawed by Section 6323 and are always inferior to the federal claim. Section 6323 is intended for the protection of the classes named therein, but it does not purport to give the Government a footstool with which to raise itself above other statutory liens of equal dignity.[30] The priority schedule may be compared to a hypothetical race where a state statutory lien wins (first in time), the federal tax lien is second, and a judgment third. If the federal tax lien is recorded, there is no change in position; but if it is unrecorded then the disqualification of Section 6323 places it third and the judgment takes over second position. Should the federal tax lien win and be recorded, it retains first position; but if it is unrecorded the judgment moves ahead of it although the statutory lien may not. The Government's failure to record can in no wise give an advantage to any but a mortgagee, pledgee, purchaser or judgment creditor, and its priority with state statutory liens is judged always from the date of assessment.

The above example presupposes that the statutory liens are choate, *i.e.*, specific and perfected, as they can otherwise be afforded no priority over the perfected tax lien.[31] An example of an inchoate lien is shown in *United States v. Security Trust and Savings Bank*,[32] where the Court held that a Federal tax lien, recorded after an attachment on original process but before judgment was rendered in the case, took precedence, as the attaching creditor did not have a perfected judgment prior to the recording of the tax lien, nor did he have a choate lien before the tax assessment arose. Similarly, he would not have had a choate lien if the assessment were made after the original attachment, as at that time the attaching creditor had not secured judgment and his lien was not, therefore, perfected. This case also holds that the effect of a lien is a Federal question, and a State's classification of a particular lien as specific and perfected is not binding against the United States. A state's classification of a lien as inchoate is held practically con-

[29] United States v. Gilbert Associates, 345 U. S. 361 (1953).
[30] United States v. Peoples Bank, 197 F. 2d 898 (5th Cir., 1952).
[31] United States v. New Britain, 347 U. S. 81 (1954).
[32] 340 U. S. 47 (1950).

clusive, however.[33] The concurring opinion of Justice Jackson in the *Security Trust* case[34] is interesting as it traces the history of Section 6321 and shows that originally it created a secret lien taking precedence even without recordation. The Supreme Court has recently held that a mechanic's lien, filed but not reduced to judgment, remains inchoate so that a tax lien subsequently recorded is entitled to priority.[35]

In dealing with realty, the schedule of priority among recorded encumbrances (including tax liens) can easily be determined by listing them in the chronological order of recordation. When we consider the judgment creditor in relation to his debtor's personalty, however, the problem is more difficult since judgment creditors have no lien on personalty regardless of the date of judgment. The institution of execution proceedings by such a creditor after the recordation of a tax lien would, therefore, find the personalty already subject to a specific encumbrance which must be satisfied before the assets can be applied to the judgment. The only manner in which the tax lien can be defeated by the judgment creditor under these circumstances is by the judgment creditor's reducing the personalty to his constructive possession through issuance and delivery of a *fi fa* to the Sheriff prior to the time the tax lien arises.[36]

LIMITATIONS

Having discussed in general the manner in which tax liens arise and the property to which they attach, we now pass to the important aspect of determining during what period the lien is operative. As we have seen, the lien arises upon assessment and demand, but it does not bind forever; and the law provides a period of limitations after which the Government cannot seek to collect its taxes.

Section 6501 provides the general rule that the tax must be assessed within three years after a return is filed or, if payable by stamp, within three years after the tax is due; and without this timely assessment, no court proceedings for the collection of tax can be instituted after the expira-

[33] See also United States v. Acri, 348 U. S. 211 (1955); U. S. A. v. Eisenger Mill & Lumber Co., 202 Md. 613, 98 A. 2d 81 (1953).

[34] *Supra*, n. 32, *conc. op.* 51.

[35] United States v. White Bear Brewing Co., Inc., 350 U. S. 1010 (1956), *reh. den.* 351 U. S. 958 (1956); United States v. Colotta, 350 U. S. 808 (1955), rev'g. 79 So. 2d 474 (Miss., 1955).

[36] United States v. Levin, 128 F. Supp. 465 (D. C. Md., 1955); United States v. Fisher, 93 F. Supp. 73 (D. C. N. D. Cal., 1948); *cf.* Gilbert Associates, *supra*, n. 29.

tion of the three-year period. The exceptions to this general rule are:

1. False return — no limitation on collection.
2. Wilful attempt to evade tax — no limitation on collection.
3. Failure to file return — no limitation on collection.
4. Waiver agreement — limitations tolled by taxpayer's waiver.
5. For other exceptions, see further provisions of Section 6501.

If the assessment has been made within the time prescribed, the lien arises; but, even though it attaches to all of the taxpayer's property, it does not attach with finality, and collection of the tax must be made within the period prescribed in Section 6502 which provides:

> "(a) Length of period. — Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—
>
> (1) within six years after the assessment of the tax, or
>
> (2) prior to the expiration of any period for collection agreed upon in writing by the Secretary or his delegate and the taxpayer before the expiration of such six-year period (or, if there is a release of levy under section 6343 after six-year period, then before such release).
>
> The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

It can be seen from this statute that in the ordinary case of non-payment of taxes where a return was filed, the Government has nine years in which to initiate collection proceedings — three years under Section 6501 to assess, and six years thereafter to collect. In this regard it should be noted that the filing of a tax return does not begin the running of collection limitations, but rather the critical

date is the time the assessment is made on the books of the Treasury Department.[37] And in cases where no return whatsoever is filed, the Government must still make its collection within six years after it puts the assessment on the books.[38]

The ambit of Federal tax liens has been shown to be much broader than that of ordinary judgments, but Section 6502 affords them a considerably shorter life-span. In order, however, to continue the lien effective, the Government need only bring suit on the tax debt within the six-year period and have the lien reduced to judgment. Collection may then be enforced at any time,[39] and the judgment carries with it all the characteristics of the original lien, extending also to personalty.[40]

The Courts have been most liberal in construing the "proceeding in court" phrase used in Section 6502, and have held that filing a claim for unpaid taxes of the deceased in Probate Court is such a proceeding as will toll limitations.[41] Even filing a tax claim with the administrator of an estate is a "proceeding in court".[42]

Where, however, the assessment is not made within the time designated in Section 6501 and/or collection is not enforced as provided by Section 6502, then the lien expires as it is "unenforceable by reason of lapse of time".[43]

RELEASE AND DISCHARGE

We come now to a point which has apparently escaped the attention of many attorneys engaged in clearing titles and foreclosing mortgages — the manner in which property may be released from the cloud of a tax lien.

Considering first the statutory law, we find the provisions for a certificate of release set out in Section 6325. The release may be granted if:

1. The tax is paid or is legally unenforceable.[44]

[37] Davidovitz v. United States, 58 F. 2d 1063 (Ct. Cl. 1932).

[38] United States v. Updike, 281 U. S. 489 (1930).

[39] United States v. Havner, 101 F. 2d 161 (8th Cir., 1939); In Re Bowen, 58 F. Supp. 286 (D. C. E. D. Pa., 1944); United States v. Caldwell, 74 F. Supp. 114 (D. C. M. D. Tenn., 1947); Investment & Securities Co. v. United States, 140 F. 2d 894 (9th Cir., 1944).

[40] Investment & Securities Co. v. United States, *ibid.;* United States v. Ettelson, 67 F. Supp. 257 (D. C. E. D. Wis., 1946), aff'd. 159 F. 2d 193 (7th Cir., 1947); United States v. Caldwell, *ibid.*

[41] United States v. Ettelson, *ibid.*

[42] United States v. First Nat. Bank, 54 F. Supp. 351 (D. C. N. D. Ohio, 1943).

[43] *Cf.* Sec. 6322, discussed *supra, circa*, p. 4.

[44] See discussion under Limitations, *supra, circa*, p. 10.

2. Bond is furnished assuring payment of the tax.
3. Other property of the taxpayer is double the value of both the tax lien and other liens superior to that of the Government.
4. The Government is paid, in part satisfaction of the whole debt, the value of the specific property for which discharge is sought.
5. It is determined that the tax lien has no value as to the specific property for which discharge is sought.

These alternatives are the only direct methods provided by the Internal Revenue Code for the release of the statutory lien created by Section 6321, and their significance is often times overlooked by the holders of superior encumbrances. The latter, such as purchase money mortgagees, are lulled into a sense of invulnerability by state laws which allow them to completely deplete the security when foreclosure is necessary, without regard for or notice to inferior lienholders.

The Maryland law, for instance, gives the purchaser at a foreclosure sale the same title as was held by the mortgagor when the mortgage was recorded[45] and this so effectively disposes of junior encumbrances that the holders thereof do not have to be joined in or notified of the foreclosure action.[46] The purchaser at such sale takes his title free and clear of all junior mortgages and judgments, and to assure himself of clear title it is only necessary that he check the records *prior* to the recording date of the instrument through which his title flows. If there are no senior encumbrances, the liens of those which are junior are wiped out as to the particular property involved, and there is no necessity that the holders of the inferior liens be joined in the foreclosure proceedings. The law is so well settled in this regard as not to admit of argument, and the theory is basic with those engaged in title work.

When, however, the junior encumbrance is a federal tax lien, the situation is drastically altered, but to even discuss the point with title attorneys unfamiliar with tax law smacks of unconstitutionality and even approaches heresy. However, it is quite apparent that the foreclosure of a senior mortgage does not authorize the Secretary of the Treasury to issue a certificate of release under Section

[45] Md. Code (1951), Art. 66, Sec. 7(c).
[46] Chilton v. Brooks, 71 Md. 445, 18 A. 868 (1889); Madore v. Thompson, 155 Md. 676, 142 A. 529 (1928).

6325 — he may only do so under the five conditions set out above. The foreclosing mortgagee could, under the fifth alternative, apply for a discharge as to his particular property by showing that its market value is not equal to the mortgage indebtedness; but, failing this, the normal foreclosure does not affect the tax lien and it remains in full force and effect against the property in the hands of the purchaser.[47]

The cases cited above affirm the theory of law that the individual states cannot, by statute or case law, exempt their citizens from the will of the sovereign. The tax lien is created by federal statute, and once it takes hold it cannot be released, wiped out, or derogated from except as provided by federal law.[48]

Assuming that a foreclosure has gone through without release of the tax lien, what is the status of the purchaser's title? It is, of course, clear of other junior liens by virtue of state law, but the tax lien still attaches for the period discussed under "Limitations".[49] If the Government chose to enforce its lien and force sale of the property, it could do so at any time and take advantage of possible appreciation in value. The new owner could not, of course, apply for a discharge after he purchases at a foreclosure sale, as that has wiped out other encumbrances and he could not show the Secretary, as required by Section 6325(b)(2)(B) that the tax lien has no value as to his specific property. There is a provision of the Internal Revenue Code, Section 7324, which does allow for such situations and provides a means for the owner to clear his title. The procedure, however, is cumbersome. First, the purchaser must request the Secretary of the Treasury to file an action to clear title and then wait six months for the inevitable refusal. After the Secretary has refused to initiate the suit, the owner must petition the District Court to be allowed to do so in his own name, and if his petition is allowed, the action may then be brought. This is not the end of the purchaser's troubles, however, for if the suit establishes a claim existing in the United States, then the Court must order sale of the property and distribute the proceeds according to the priorities

[47] See Oden v. United States, 33 F. 2d 553 (D. C. W. D. La., 1929); Michigan v. United States, 317 U. S. 338 (1943); Metropolitan Life Ins. Co. v. United States, 107 F. 2d 311 (6th Cir., 1939); Integrity Trust Co. v. United States, 3 F. Supp. 577 (D. C. N. J. 1933); United States v. Kensington Shipyard & Drydock Corp., 169 F. 2d 9 (3rd Cir., 1948); Miners Sav. Bank of Pittston, Pa. v. United States, 110 F. Supp. 563 (D. C. M. D. Pa., 1953), and cases collected in 105 A. L. R. 1244; 174 A. L. R. 1373, 1403.

[48] Miners Sav. Bank of Pittston, Pa. v. United States, *ibid*, 570.

[49] *Supra, circa*, p. 10.

as they may be found. In *Metropolitan Life Ins. Co. v. United States*,[50] the Circuit Court of Appeals held that under this statute it was powerless to decree clear title in the purchaser even if it found that his superior interest in the fair market value of the property, flowing through the mortgagee, would completely wipe out that of the United States. The Court said that in order to eliminate the tax lien it must order a new sale of the property in a proceeding to which the United States had been made a party.

A different result was reached in a district court case in Pennsylvania where the Court felt that, under the provisions of 28 U. S. C. A. Sec. 2410, it could decree clear title to the purchaser without sale where it was clear that the tax lien would not share in the proceeds if the property were resold under the original mortgage.[51] Had the value of the property increased to the point where sale would produce a surplus over the mortgage indebtedness, however, the Court would not reach the same result.

In either case, the proposition stands that the purchaser has bought himself a law suit along with his property, and he, no doubt, has few kind words for the heavy armor in which Congress has sheathed the tax lien. But, even though the necessity for collecting taxes makes such strong measures necessary, recognition is given to mercantile and commercial problems, and the federal law does provide a relatively simple way for disposing of tax liens before the title to property becomes enclouded and unmerchantable.

Under the provisions of Title 28, U. S. C. A. Section 2410, the United States has consented to be sued, in either state or federal court, by any person desiring to quiet title to his property or to foreclose a mortgage or other lien. The statute applies to both realty and personalty, and provides that a judicial sale under this section has the same effect regarding discharge of the Government's lien as is given to such matters by local law. In comparison to the methods set out in Sections 6325 and 7424 of the Internal Revenue Code, this manner of procedure appears to be the least cumbersome, the least expensive, and the most expedient way to dispose of junior tax liens; and the holder of a lien *inferior* to that of the Government may likewise use this section to initiate foreclosure action.

It must, however, be borne in mind that when the United States consents to be sued, the suit must be in

[50] 107 F. 2d 311 (6th Cir., 1939).
[51] Miners Sav. Bank of Pittston, Pa. v. United States, *supra*, n. 47, 572.

strict accord with the consent given. Section 2410 requires specifically:

1. A complaint describing with particularity the nature of the Government's lien — the mere filing of a mortgage with directions to the clerk to docket a foreclosure action against the mortgagor and the government would not be sufficient.
2. Naming the United States as party-defendant. — Neither the Director of Internal Revenue nor the Secretary of the Treasury is a proper party to the suit.[52]
3. Service of the complaint upon the local United States Attorney with copies mailed to the Attorney General at Washington.
4. An allowance of sixty days for the Government to file its answer — not some lesser time prescribed by state practice.
5. A period of one year from date of sale within which the United States may redeem the property sold.

With these requirements in mind, it would appear necessary that the preliminary steps to foreclosure or execution on judgment include a search of the Federal Tax Lien Index to the last entry and not merely to the date of the mortgage or judgment. Special attention should also be given to judgments against the owner to preclude the possibility that such judgments might result from tax liens and cloud title in the future. If such encumbrances are discovered, then the interested party might apply for discharge under Section 6325 by showing that the proceeds of sale would leave nothing for the Government after satisfaction of the mortgage or judgment. Assuming that such is not the case, or that the interested party wishes to take immediate action and not await a possibly delayed answer regarding the discharge from the Internal Revenue Service, then suit may be filed in either state or federal court. Both the mortgagee and the United States should be made parties defendant, and a concise explanation of the Government's interest will suffice to satisfy the statute. State law probably does not require service of process on the mortgagee, but a copy must be mailed to the Attorney General in Washington,

[52] Maryland Casualty Co. v. Charleston Lead Works, 24 F. 2d 836 (D. C. E. D. S. C., 1928); Czieslik v. Burnet, 57 F. 2d 715 (D. C. E. D. N. Y., 1932).

D.C., and service (preferably two copies of the pleadings) made on the local United States Attorney. The ordinary advertisement and notice of sale will probably have to be altered as the Government is allowed sixty days in which to answer the suit, but personal contact with the United States Attorney may result in an agreement to speed up the answer and allow an early sale. The advertisement should also inform prospective purchasers of the one year redemption period.

When these requirements have been satisfied, there is no further departure from normal procedure, and the sale may progress without fear that a clouded and unmerchantable title might arise at some future date.

SUMMARY

As can be seen from the decisions cited herein, the Courts have agreed with the words of the Supreme Court—"[S]tronger language could hardly have been selected to reveal a purpose to assure the collection of taxes"[53] — and construed the provisions of the Internal Revenue Code to carry out this avowed purpose.

We should bear in mind, then, that when a tax lien enters into the picture, state statutes and precedents bow out. The effect of the lien, its inception, duration, and release are all matters controlled by federal law, and every competing interest is bound thereby. The most salient features to be remembered are:

1. The tax lien is a general and perfected encumbrance reaching all realty and personalty, including that after-acquired, of the taxpayer.
2. Even though it is unrecorded, a tax lien takes precedence over junior competing interests except those of mortgagees, pledgees, purchasers and judgment creditors.
3. The tax lien expires six years after assessment, unless there are proceedings in court within that period to preserve the rights of collection.
4. Administrative discharge of a tax lien may be accomplished as spelled out in 26 U. S. C. A. 6325.
5. Judicial discharge of a tax lien may be accomplished by making the United States a party to the court action and following the provisions of 28 U. S. C. A. 2410.

[53] Glass City Bank v. United States, 326 U. S. 265, 267 (1945).